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In the Supreme Court of the United States

OCTOBER TERM, 1938.

MRS. ZILLAH LYON ..... Petitioner

vs. No. 189

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION ..... Respondent

STATEMENT, BRIEF AND ARGUMENT FOR RESPONDENT

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STATEMENT OF THE CASE

William R. Lyon, deceased policyholder, died on the 19th day of July, 1934, by accidental means. The purely accident policy (for death benefits), which was introduced in evidence, was issued December 31, 1926, and the plaintiff appeared as beneficiary in said policy. A quarterly payment of $16.00 was made on April 1, 1927, and quarterly thereafter up to and including April 1, 1934. Each premium receipt, although some were different in wording than others, stated the date for which the premium was due, as well as the date of receipt, and that it:

> "does hereby continue in force the said policy from date hereof until twelve o'clock noon, standard time, July 1, 1927,"

at which time the next quarterly payment would be due, and so on, each receipt carrying the policy in force for the ensuing quarter. It is admitted that the premium due July 1st, 1934, was not paid. It will be noted from reading the complaint (R. 9), on which this case was tried in the trial Court, that the petitioner admitted that this

premium had not been paid but attempted to excuse herself on the ground that the insurance company had established a custom of accepting payments late. It is true that she did attempt to pay the premium by United States postal money order for $16.00, dated July 6th, 1934, which was forwarded by her to the Little Rock office of the respondent and was returned by letter dated July 13th, 1934 addressed to the deceased policy holder, the letter to the policy holder in part providing:

> "We regret that it will not be possible for us to accept this payment, as the Home Office did not send us an official receipt for you.
>
> "We note that you are past the age of sixty years, but we are today writing our Home Office and asking if it will be possible to make an exception in your case, and allow you to continue keeping your policy in force with the Thirty Day Elimination Endorsement attached. Kindly advise if you would desire to keep your policy in force if our Home Office will attach a Thirty Day Elimination Endorsement. * * *." (R. 28)

This letter was mailed on July 13th, several days before the insured's death, which occurred on the 19th day of that month.

Sub-section "C" of the Additional Provisions of the policy provides in part:

> "The acceptance of any premium on this policy shall be optional with the association."

The policy is clearly for term insurance, the identical policy having been passed upon numerous times by the Courts as such. The policy itself provides on its face that a premium would be due "April 1st, 1937" and that:

"If any such dues be unpaid at the office of the Association in Omaha, Nebraska, this policy shall terminate on the date such payment is due."

It also specifically provides under Additional Provisions, Sub-section "D":

"The term of this policy begins at 12:00 o'clock noon, standard time, on date of issuance against accident and on the 31st day after date of issuance against disease, and ends at 12:00 o'clock noon of the date any renewal is due."

It is undisputed that a premium was due July 1st, 1934. It is undisputed that a premium was offered to be paid some time after July 6th, 1934, and that the company exercised its option to refuse the acceptance of same, as it had a right to do under the policy, by returning the premium offered before the loss occurred. Although the petitioner in the pleadings admits a failure to pay the July 1st premium and offers an excuse for said failure, an attempt was made in the trial court to prove by oral testimony that $74.00 in cash was paid when the policy was taken out to a since deceased agent and that the company therefore had on deposit more than enough to take care of the July 1st premium, and that this since deceased agent told her at the time that there were no days of grace and that payment of a year's premiums in advance would take the place of grace. (R. 41).

It was contended by respondent in the trial Court and throughout in this case that, first, the policy specifically provided when it expired, (three months after its issuance), and that a quarterly payment was necessary to keep it in force for each quarter, second, that receipts

for the premium payments (R. 33-41) clearly disclosed the period of insurance paid for by each and every premium and the date the insurance coverage terminated after the payment of said premium. There were twenty-seven of these premium receipts introduced in evidence by the petitioner's own testimony. It was contended that she therefore was estopped and bound by the recitals in the premium receipts as well as the terms of the policy itself. Third, that oral testimony could not vary the terms of the insurance contract and of the written receipts.

BRIEF AND ARGUMENT

The last premium tendered and accepted was received at Little Rock, Arkansas, on March 30th, 1934 and reads in part as follows:

> "Official receipt for premium due April 1st, 1934 * * * keeps your policy in continuous effect * * * until 12:00 o'clock noon, standard time, July 1st, 1934. * * * *."
>
> (R. 25).

Every receipt, and they were all quarterly receipts, beginning the first quarter after the policy was issued, stated plainly the period for which the premium was paid and the date on which the policy coverage expired, as does the premium receipt referred to above. The receipt was binding on the parties. The policy itself provides:

> "The term of this policy begins at 12:00 o'clock noon, standard time, on the date of issuance against accident * * * and ends at 12:00 o'clock noon on the date any renewal is due."

and provided that a premium of $16.00 was due on a specific date three months after date of issuance. Each receipt provided for the next renewal date, which was at the termination of the quarter for which the receipt, itself was issued.

In the case of Gorman v. Fidelity & Casualty Company of New York, 55 Fed. (2d) 4, the Court held:

> "Where it was determined that accident insurance policy expired on a specific date, no liability could arise thereafter under contract based on accident occurring subsequent to expiration date."

The Court in the opinion stated:

"It would seem to be elementary that no liability could possibly be incurred under this or any other contract after it had expired. Liability, if any here, must be bottomed on contract and certainly no liability could arise for a contract unless said liability had its inception when that contract was in existence * * *. The contract expired and terminated February 1st, 1927—not for some purposes but for all purposes * * *."

In the first appeal of that case this Court held:

"The provision in the policy to-wit, that 'At the expiration of the term for which this policy is issued, and at the expiration of any term for which it may be renewed, the company will, subject to all the provisions and limitations therein contained, renew the policy for a similar term in consideration of the premium for the renewed term.'"

Fidelity & Casualty Co. of New York vs. Gorman, 38 Fed. (2d) 590.

In that case the Court held that the Company had the right to refuse to renew the policy where the insured was at the time suffering from the effects of an accident, and there the policy provided:

"That the assured upon the date said renewal takes effect is in sound condition. * * *"

In the case at bar the policy unequivocally states:

"The acceptance of any premium on this policy shall be optional on the association."

It is undisputed in this case that the premium was refused and returned after it was due but prior to the death of the insured. The evidence discloses that on July 13th prior to the death of the insured, which occurred on July 19th, the insurance company by letter returned the premium offered, stating in that letter:

"We regret that it will not be possible for us to accept this payment, as the Home Office did not send us an official receipt for you." (R. 28).

There is no question from the record in this case but what the policy terminated on the first day of July, 1934; that on the first day of July, 1934, the company exercised its right to refuse the premium, not on the ground that it was tendered too late but on the ground that the defendant did not desire to continue the insurance in force, as it had a right to do under the contract between the parties.

In the case of Craig v. Golden Rule Life Insurance Company, 184 Ark. 48, 41 S.W. (2nd), 769, the Supreme Court of Arkansas in its opinion stated:

"The parties made their own contract, which is free from ambiguity and necessarily must be enforced according to its terms. The beneficiaries must stand in the shoes of the insured and will be bound by the terms of the policy issued; and the insured accepted and retained, without objection the policy until it was forfeited for non-payment of premiums upon the date fixed by its terms." (Citing cases).

It is contended by counsel for petitioner that because the insurance policy improved in death benefits (there was never any cash or loan value on the policy) the longer it had been in force, it was therefore not a term policy but became in fact assimilated to lifetime insurance, terminable like life insurance only upon notice for failure to pay premiums after full opportunity to pay had been given. It is argued that under these provisions an insured builds up an increasing interest of value in the policy and that it would be harsh to let him be deprived

of such increase at the option of the association.

The Circuit Court of Appeals in its opinion in this case stated:

> "But we are not persuaded that the promise to make the additions to the accidental death benefits if the policy should be continued change the nature of the insurance. It is observed that the increases in the amounts promised by the policy do not apply to the numerous other hazards covered but only to loss by accidental death, and it is not contended that the increase would cause the insurance to become unprofitable to the association or that there was any fraud in the transaction. The practice of including similar promises in accident insurance policies is not uncommon and we are not cited to any case which supports the contention that such increase of benefits works a change in the nature of the insurance."

It is to be noted that in the brief filed in this Court no cases are cited by counsel for petitioner to support his contention in this respect.

The parties in making that contract, like other contracts, had a right to provide for the terms and conditions of the contract, and in the absence of fraud are bound thereby. As stated in the case of Prange v. International Life Ins. Co. of St. Louis, 329 Mo. 651, 46 S.W. (2d) 534, the Court states:

> "• • • he must have known that for the payment he was then making he was getting nothing more than term insurance for a term beginning on that date and ending April 4, 1923. • • • Courts are without authority to rewrite contracts, even insurance contracts, although it may appear that in some respects they operate harshly or inequitably as to one of the parties; they discharge their full duty when they ascertain and give effect to the intentions

of the parties, as disclosed by the contract which they have themselves made."

The Arkansas authorities so hold.

Home Mutual Benefit Association v. Mayfield, 142 Ark. 240; 218 S.W. 871;

Southern Surety Co. v. Penzel, 164 Ark. 365; 261 S.W. 920;

Mutual Benefit Society v. Harris, 178 Ark. 24; 9 S.W. (2nd) 773;

McDaniel v. Missouri State Life Ins. Co., 185 Ark. 1160; 51 S.W. (2nd) 981.

Certainly the policy holder in the case at bar must have known that for the payment he was then making, "April 1st premium" he was getting nothing more than term insurance for a term beginning on that date and ending July 1st, 1934. There were twenty-seven premium receipts introduced in evidence, each one stating the period of the insurance coverage. These premium receipts were issued by the respondent and accepted without protest by the insured. They were issued quarterly over a period of more than seven years. The parties to this insurance contract thereby construed the contract itself.

In the case of Craig v. Golden Rule Life Ins. Co., 184 Ark. 48, 41 S.W. (2d) 769, supra, the Supreme Court of Arkansas again stated the recognized principle of law that:

"It is a well settled principle of law that in the interpretation or construction of the contract, the construction the parties themselves have placed on a contract is entitled to great weight and will generally be adopted by the courts in giving effect to its provisions. This is especially true in cases of ambiguity in the written contract." (Citing cases).

In the case of Ripley v. Sage Land & Improvement Co., 138 Wis. 304, 119 N.W. 108, the Court held:

> "One who accepts and retains for a long period, without objection, an account rendered, together with the balance shown to be due thereon, irrevocably assents to the account so that he cannot subsequently take steps to falsify it."

And so in the case at bar, where an account was stated every three months for seven years and three months, can the plaintiff now come into Court and say that they were both wrong all the time in the statement of their mutual rights and liabilities, particularly in view of the fact that she acted with and as the agent for the policy holder (R. 28) so far as transactions with the defendant were concerned, and where she comes into Court, filing two complaints, and never suggests that additional premiums were paid until after the law of this case was argued on demurrer and not then until the actual trial of the case had proceeded on its merits? Plaintiff should be estopped by her own actions.

It has many times been held that the identical policy here involved is strictly a term policy.

In the case of Smith v. Mutual Benefit Health & Accident Ass'n., 10 F. Supp. 110, construing a provision of the insurance contract under consideration here, the Court stated after quoting this provision of the policy:

> "The acceptance of any premium on this policy shall be optional with the Association, and should the premium provided for herein be insufficient to meet the requirements of this policy, the Association may call for the difference as required."

That:

> "Clearly under the last-quoted paragraph the defendant company has a right to terminate this policy and to refuse to accept future premiums."

In that case the Court held that the Association could not terminate the policy so as to affect any existing claim. We wish to call the Court's special attention to the case of Johnson v. Mutual Ben. Health & Accident Ass'n., 123 Cal. App. 41, 10 Pac. (2nd) 772, where a demurrer was sustained to the second amended complaint, where the facts alleged are almost identical with the facts set out in the first amended complaint in this case, and where the Court held:

> "Under allegations of plaintiff's complaint, accident and health policy held not in force at insured's death because of non-payment of premium. * * * and the policy provided that it would terminate on day installment payment was due if not paid."

The Supreme Court of Oklahoma in the case of Davis v. Mutual Benefit Health & Accident Ass'n., 168 Okla. 514, 34 Pac. (2d) 579, construing a policy identical with the policy sued on herein held:

> "Accident policy; which by its terms expired at noon Sunday, held not to cover accident occurring Sunday afternoon, since fact that last day for payment of premium fell on nonbusiness day did not extend policy."

And the Court in its opinion continued:

> "The insurance company specifically reserved the right of option to be exercised by it in the acceptance of any premium upon the policy. * * * The extension of an option under a benefit, health, and accident policy and the extension of coverage of insurance

under such a policy are not synonymous or convertible terms."

The Supreme Court of Arkansas in the case of Matthews v. Continental Casualty Company, 78 Ark. 81, 93 S.W. 55, says:

"The defendant insured Ivan I. Matthews against accident occurring 'within one year from twelve o'clock noon standard time of the date of the policy, which was the 11th day of December, 1902.' The accident to Matthews happened on the 11th day of December, 1903 at four o'clock and thirty minutes in the afternoon. Did the defendant insure Matthews against this accident? This is the only question in the case.

"The parties to the contract of insurance agreed and stipulated when the year should begin. They had the right to fix the time and did so. The contract was valid and must be enforced according to its terms. The accident did not occur within the year so fixed and plaintiff cannot recover."

In the case of Yett v. Oregon Surety & Casualty Company, 88 Or. 620, 172 Pac. 486, it was held:

"The acceptance for several months, by one insuring against accident from month to month by a policy requiring payment of premiums on the first of each month in advance, and reserving to the insurer the right to refuse to renew, of premiums after the premium day has passed, confers no right on the insured to a renewal by tender of premiums after the premium day has passed."

In the case of Raynor v. National Cas. Co., 125 Misc. Rep. 174, 210 N. Y. Supp., 586, it was held:

"Accident policy by its terms extending to specified date and for such further time as may be stated in the renewal receipts and providing that premiums were payable on first of each month, in advance, constituted continuing offer by company to renew policy

whenever additional premium was paid, and on insured's failure to pay renewal premium in advance policy terminated, precluding recovery for insured's accidental death, thereafter and before tendering premium, notwithstanding insurer had previously accepted delayed premiums."

In the case of Balch v. Fed. Life Ins. Co., 227 Pac. 826, 39 Idaho 304, it was held:

"A health and accident policy issued for three months, to terminate at noon on a definite date named therein, providing that it may be renewed for another three months on payment in advance of the premium for that length of time, but provides that it shall continue in force only so long as the further premium shall be paid in advance * * * terminates without notice at the expiration of time for which the premium is paid."

At the close of the evidence in this case the insurance company moved for an instructed verdict on the following grounds:

"That the policy terminated by its own terms on the first day of July, 1934, and that the defendant herein, as shown by the policy and as the evidence discloses, had the option to reject a premium payment and exercised that option; and on the further ground that the premium receipts, themselves, show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred."

The Circuit Court of Appeals held that this motion should have been granted. Counsel for petitioner contends that oral testimony should be accepted as varying not only the terms of the policy but the terms of twenty-seven separate and distinct premium receipts. The rule is so well established that oral testimony may not vary the terms of a written contract that counsel feel that it is unnecessary to cite authority on this point. Counsel cite numer-

ous authorities in contending that testimony of an oral contract may vary the terms of a written contract if not objected to when offered in evidence. None of the authorities cited so hold. There are no authorities that permit an oral contract to vary the terms of a written contract simply because such oral contract is established in evidence. After citing these authorities, counsel cite numerous authorities on the proposition that:

> "An admitted agent may be dealt with as a general agent in matters within the apparent scope of the agency, * * *"

which bcomes unimportant unless the claimed oral contract is to be permitted to supersede the original written conract and the twenty-seven original premium receipts.

Under Specification of Error No. 3 argued by counsel for petitioner it is stated:

> "The Court of Appeals held that the contract provides for insurance on the quarterly payment plan and therefore any change in the plan of payment would amount to a change and extension of the terms of the contract, and that the local treasurer was without authority to bind the company with such a change.
>
> "It is obvious that in reaching that conclusion the Court failed to give due effect to the well-settled rule that requires a construction of the terms of the policy most liberally in favor of the insured, and that in case of conflict or ambiguity a construction will not be adopted that will defeat recovery if it is susceptible of a meaning that will permit one." (Petitioner's brief, page 20).

Could there be any ambiguity or misunderstanding on April 1st, 1934, when the last premium was paid and

accepted as to what period that premium payment covered and as to when insurance coverage terminated?

This premium receipt plainly states:

> "* * * until twelve o'clock noon, standard time, July 1, 1934, at which time another premium will be due."

Apparently, from the contention made by counsel for petitioner, his client did not understand that the policy was continued in force by the payment of this particular premium to:

> "twelve o'clock, noon, standard time, July 1st, 1934 * * *." (R. 25).

but that it was vague and indeterminate as to when the policy coverage would terminate. If this had been the only receipt that so provided it may have been contended by petitioner that it was overlooked, but as the record shows in this case, twenty-seven such receipts were issued and accepted without protest by the policy holder and the petitioner.

There could not be more explicit printed language than:

> "until twelve o'clock noon, standard time,, July 1st, 1934."

It is contended by petitioner, however, that this receipt was incorrect, as were the twenty-seven others that were introduced in evidence and in truth and in fact the receipt did not mean what it said, but that the insurance was carried over and beyond "twelve o'clock noon, standard time, July 1st, 1934" and that there was at the time an

uncertainty as to what period the insurance coverage ran. Furthermore, after the first day of July, 1934, and before the death of the policyholder, the insurance company, by letter returned the quarterly premium payment that was tendered late, stating:

> "* * * we regret that it will not be possible for us to accept this payment, * * *." (R. 28)

The policy plainly provides:

> "The acceptance of any premium on this policy shall be optional with the association." (Additional Provisions, Paragraph "C").

It is undisputed that the premium was returned before the loss occurred. It is apparently contended by petitioner that the provision:

> "The acceptance of any premium on this policy shall be optional with the association."

is meaningless and of no effect whatsoever. Certainly, if the insurance company had the right to refuse the premium and exercised that right within the time, it would not be held for any loss occurring subsequent thereto.

Under Specification of Error No. 5 (petitioner's brief 35) petitioner argues that the trial court did not err in directing a verdict for the petitioner. We feel that this Specification of Error is unimportant and that the issues in this case are determined by the explicit provisions of the insurance policy and the authorities above referred to. However, since the specification is argued at length, we desire to refer the Court to the case of Blankenship

v. Modglin, 177 Ark. 388, 68 S.W. (2nd) 531, where it was stated in the opinion:

> "Blankenship relied upon his own testimony in the case to show that the mortgage indebtedness was not paid. This court is committed to the rule that the positive testimony of an interested party will not be treated as undisputed." (Citing cases)

The only witness who testified in the case at bar was the petitioner, who certainly was an interested witness, and who testified regarding a contended transaction with a since deceased agent of the Association. Although, as the record shows in this case, petitioner carefully preserved the premium receipts paid after the delivery of the policy, yet no memorandum whatever was taken or other written evidence made of the contended payment of $74.00 to this since deceased agent.

Furthermore, since petitioner did not move for a directed verdict, the mere fact that respondent did would not have the effect of withdrawing the case from the jury or conceding that the case should be taken from the jury.

65 C. J. 434.
Webber v. Rodgers, 128 Ark. 25, 93 S.W. 87.
Sigua Iron Co. v. Green, 88 Fed. 209.

CONCLUSION

The policy evidenced a contract of term insurance which association had a right to discontinue at any time when renewal was due. By its letter refusing a renewal receipt and returning the postal money order, it did terminate the policy. The proposal to enter into a differ-

ent contract was not acted upon. The term of insurance was ended prior to the accident.

The insured began making quarterly payments of $16.00 immediately before the date, April 1st, 1937, and kept them up each quarter for years, and that is what the parties meant and intended should be done. Each receipt stated the expiration date of the insurance coverage.

As stated in the case of Craig v. Golden Rule Life Ins. Co., supra, by the Supreme Court of the State of Arkansas:

> "It is a well settled principle of law that in the interpretation or construction of the contract, the construction the parties themselves have placed on a contract is entitled to great weight and will generally be adopted by the courts in giving effect to its provisions."

The parties over a period of more than seven years in writing stated and acknowledged that the insurance coverage expired at the end of each quarter. Can the courts now say that the last premium receipt extended the coverage beyond that period?

The respondent prays that the action of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

SIGNED THOS. B. PRYOR

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